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Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

MARTIN J. WEINSTEIN
ROBERT J. MEYER
WILLKIE FARR & GALLAGHER LLP
1875 K St., N.W.
Washington, DC 20006
(202) 303-1000

THEODORE V. WELLS, JR.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Ave. of the Americas
New York, NY 10019

WALTER E. DELLINGER
Counsel of Record
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

PAUL W. WRIGHT
PATRICK J. CONLON
EXXON MOBIL CORPORATION
800 Bell Street
Houston, TX 77002

Additional Counsel Listed on Inside Front Cover

ALEX YOUNG K. OH
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
LLP
1615 L St., N.W.
Suite 1300
Washington, DC 20036

Attorneys for Petitioners

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Supreme Court Rule 15.8, petitioners hereby submit this supplemental brief in response to the brief filed by the Solicitor General.

This Court should grant review to decide whether a party may take a collateral order appeal when the Executive Branch warns that the litigation itself would adversely affect foreign relations, and the district court nonetheless refuses to dismiss the case under the political question doctrine. The Solicitor General's response to this Court's invitation only reinforces the need for the Court's review.

Critically, the Solicitor General agrees with petitioners that the court of appeals erred in holding that a refusal to dismiss on political question grounds can never support a collateral order appeal. The Solicitor General also agrees with petitioners that, at least in certain circumstances, a party may take a collateral order appeal when the very pendency of litigation would adversely affect foreign relations and the district court nonetheless refuses to grant dismissal on political question grounds. Finally, the Solicitor General agrees with petitioners that the court of appeals' categorical bar on collateral order appeals from the denial of dismissal on political question grounds imperils interests of great importance. Those areas of agreement demonstrate that the Court should grant review to correct the court of appeals' erroneous limitation on the availability of collateral order review.

While agreeing with petitioners on those critical points, the Solicitor General nonetheless recommends against the grant of certiorari. The Solicitor General's reasons for recommending against certiorari review, however, do not justify allowing the court of appeals' concededly erroneous and harmful ruling to stand.

A. The Court Of Appeals Erred In Holding That Collateral Order Review Is Categorically Unavailable For A Political Question Claim, And That Error Raises An Issue Of Exceptional Importance

The court of appeals held that, because the political question doctrine does not confer an immunity from suit, a party can never take collateral order appeal from the denial of dismissal on political question grounds. Pet. App. 12a, 16a ("We hold that the denial of a motion to dismiss upon political question grounds is not an immediately appealable collateral order."). That holding is deeply flawed.

When, as here, the first two requirements for collateral order review are satisfied, *see* U.S. Br. 10, the third and remaining requirement is that the issue sought to be appealed would be effectively unreviewable in an appeal following final judgment. *See, e.g.*, *Will v. Hallock*, 546 U.S. 345, 349 (2006). That requirement, contrary to the court of appeals' view, does not turn on whether there is a claim of immunity. The critical question instead, as this Court has explained, is whether a "trial . . . would imperil a substantial public interest." *Id.* at 353. When the Executive Branch warns that the litigation itself en-

dangers the United States's foreign relations interests, a trial necessarily "would imperil a substantial public interest." *Id.*; *see* Pet. App. 135a. This Court's decision in *Will* therefore authorizes a collateral order appeal in this case, and the absence of a claim of immunity from suit should be beside the point.

The Solicitor General agrees that the court of appeals' immunity-only limitation cannot be reconciled with this Court's decision in *Will*. U.S. Br. 12. As the Solicitor General explains, that rigid rule would bar collateral appeals in separation-of-powers cases that satisfy the *Will* standard but that do not involve a claim of immunity. *Id.* at 12-14. In particular, the Solicitor General observes, the court of appeals' immunity-only rule would deny a collateral order appeal from a district court order refusing to dismiss a case under the rule announced in *Totten v. United States*, 92 U.S. 105 (1875). It would also preclude a collateral order appeal when a district court holds that a task force composed of cabinet-level officers and chaired by the Vice President is subject to public disclosure requirements. And it would foreclose collateral order review of a political question claim when the Executive Branch warns that the pendency of litigation would adversely affect foreign relations and explicitly seeks dismissal on that basis. *See* U.S. Br. 12-14.

The harmful consequences that would follow from the court of appeals' approach are self-evident. As the Solicitor General recognizes (U.S. Br. 14), the court of appeals' rule would allow litigation to continue even when it would "imperil a substantial pub-

lic interest." *Will*, 546 U.S. at 353. And it would foreclose collateral order review even in cases in which the Executive Branch explicitly seeks dismissal because the pendency of litigation would damage foreign relations.

B. The Solicitor General's Disagreement With Petitioners On The Correct Collateral Order Standard Affords No Reason To Deny Review

The Solicitor General disagrees with petitioners' position that collateral order review is available when the Executive Branch warns that the pendency of litigation would adversely affect foreign relations. In the Solicitor General's view, a collateral order appeal based on such a warning should be available only when the Executive Branch explicitly seeks dismissal of the suit on that basis. U.S. Br. 14. The Solicitor General's approach cannot be squared with *Will*. When a district court proceeds with litigation notwithstanding an Executive Branch warning that the pendency of litigation will damage foreign relations, continuation of the litigation necessarily "imperil[s] a substantial public interest," *Will*, 546 U.S. at 353, regardless of whether the Executive Branch explicitly seeks dismissal on that basis. Accordingly, under *Will*, when the Executive Branch issues such a warning and the defendant seeks dismissal on that basis, a district court's refusal to dismiss should be subject to a collateral order appeal.

The Solicitor General offers no explanation of why an explicit request for dismissal by the Executive Branch could be necessary to satisfy the *Will*

standard. And there is no precedent for conditioning the availability of a collateral order appeal on an explicit request for a dismissal. To be sure, when a dismissal is sought based on foreign-relations concerns but is denied by the district court, it is fully appropriate to condition the availability of a collateral order appeal on the Executive Branch's expert *foreign-policy* judgment that the litigation will adversely affect foreign relations. But there is no comparable basis in the concerns underlying collateral order review to condition the availability of a collateral order appeal on the Executive Branch's *legal* (or tactical) judgment concerning whether to seek a dismissal.*

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* The government recently urged this Court to grant review of a court of appeals' decision permitting continuation of a lawsuit alleging that certain corporations aided and abetted violations of international law committed by the South African government. *See* U.S. Br., No. 07-919, *Am. Isuzu Motors, Inc. v. Ntsebeza*. In urging this Court to grant review notwithstanding that the case was in an interlocutory posture, the government explained that the mere pendency of the lawsuit raised significant foreign relations concerns. *See id.* at 18-22. The government reached that conclusion even though the State Department's statement-of-interest in that case had not explicitly sought a dismissal. *See* Pet. App. 193a-196a. While that case involved a request for interlocutory review by this Court rather than a collateral order appeal to a court of appeals, it demonstrates that the mere pendency of a lawsuit can raise significant foreign policy concerns and thus justify a collateral order appeal under *Will*, regardless of whether the Executive Branch's statement of interest explicitly seeks a dismissal.

Whatever the ultimate merits of the Solicitor General's recommended approach, however, the crucial point is this: The court of appeals has issued a ruling that precludes collateral order review under *both* petitioners' standard and the Solicitor General's standard; and the question whether the court of appeals' standard, petitioners' standard, or the Solicitor General's standard should govern this area is one of exceptional importance. This Court therefore should grant the petition and resolve on the merits which of the three competing approaches states the correct collateral order rule in the context of this case.

C. This Case Squarely Raises The Question Presented By The Petition

The Solicitor General argues (U.S. Br. 15-16) that the question raised by the petition—whether a party may take a collateral order appeal when the Executive Branch warns that the pendency of the litigation will adversely affect foreign relations—is not squarely presented by the case. According to the Solicitor General, the court of appeals did not resolve that issue. The Solicitor General is mistaken.

Petitioners' position is that a party may take a collateral order appeal when the Executive Branch warns that the pendency of litigation would harm foreign relations and the district court nonetheless refuses to grant dismissal on political question grounds. The court of appeals rejected that argument, holding instead that a district court' refusal to dismiss on political question grounds can never be appealed under the collateral order doctrine because

the political question doctrine does not confer an immunity from suit. Pet. App. 9a-16a. That holding definitively resolved the question presented by petitioners, making this case an appropriate vehicle for addressing the issue.

The Solicitor General contends (U.S. Br. 15-16) that the court of appeal did not resolve the question presented by petitioners because the court did not accept the question's factual predicate—*viz.*, that the Executive Branch had warned that the litigation itself would endanger foreign relations. That contention reflects a misreading of the court of appeals' opinion. In the portion of its opinion addressing the applicability of the collateral order doctrine (*see* Pet. App. 9a-16a), the court of appeals did not address whether the Executive Branch had warned that the pendency of the litigation would imperil foreign relations. Instead, the court of appeals dismissed the appeal on the categorical ground that "the denial of a motion to dismiss based upon political question grounds is not an immediately appealable collateral order." *Id.* at 16a.

In contending that the court of appeals disputed the factual predicate of the question presented, the Solicitor General relies exclusively on statements in the court of appeals' discussion of the availability of *mandamus* review, not its discussion of collateral order review. *See* U.S. Br. 15-17; Pet. App. 17a-18a. Moreover, even in its discussion of mandamus review, the court of appeals concluded only that the State Department had not "*unambiguously*" requested that the district court "dismiss" the case, and that it thus was not "indisputable" that the dis-

trict court had erroneously failed to dismiss the case. *Id.* at 18a. Those statements are not inconsistent with the factual predicate for petitioners' collateral order appeal. The factual predicate is not that the State Department made an "unambiguous" request to "dismiss" the case, or that the district court "indisputably" erred in declining to dismiss. Instead, the factual predicate is that the Executive Branch had warned that the litigation itself would adversely affect foreign relations.

Moreover, the factual predicate for petitioners' collateral order appeal is plainly present. The State Department warned that the "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." Pet. App. 133a. Specifically, the State Department warned "that adjudication of this case will be perceived in Indonesia as a U.S court trying the [Government of Indonesia] for its conduct of a civil war," and that the "lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity." *Id.* at 134a-135a.

As the Solicitor General notes (U.S. Br. 15-16), the district court subsequently dismissed the claims against a natural gas company owned by the Indonesian government and also dismissed the federal claims premised on alleged international-law violations of the Indonesian government. That narrowing of the suit, however, did not remove the factual predicate for a collateral order appeal. The district

court declined to dismiss the state-law claims against petitioners, and as Judge Kavanaugh explained, those claims "pose just as much a threat to U.S. foreign policy interests as the federal-law claims." Pet. App. 37a. That is because, as Judge Kavanugh observed, the state-law claims—no less than the federal claims—require respondents to "prove that members of the Indonesian military engaged in acts of violence in Indonesia against Indonesian citizens," squarely implicating the foreign policy concerns identified in the State Department's letter. *Id.* at 36a. It bears noting in this regard that this Court has specifically left open the possibility that a stay of proceedings in the district court may be warranted "in light of further developments" in that court. Letter from Clerk, January 7, 2008, denying without prejudice Application No. 07A546, *Exxon Mobil Corp. v. Doe*, No. 07-81 (Roberts, C.J., in chambers).

The Solicitor General observes that the court of appeals "reasonably regarded" the case as one in which the Executive Branch had not warned that the litigation itself would harm foreign relations. U.S. Br. 8. As explained above, however, the court of appeals did not reach that conclusion, but instead assessed only whether the district court had "indisputably" erred in declining to dismiss the case based on the Executive Branch statement. And in any event, even assuming *arguendo* that the court of appeals' had reached that conclusion, the Solicitor General does not state that the court of appeals was correct in doing so. Significantly, the Solicitor General does not take issue with Judge Kavanaugh's recognition that respondents' state-law claims neces-

sarily require putting the actions of the Indonesian military on trial. A collateral order appeal is available in such circumstances to avoid the ensuing harm to foreign relations.

D. Mandamus Is Not A Substitute For A Collateral Order Appeal

The Solicitor General contends (U.S. Br. 19) that review is unwarranted because, if the court of appeals had agreed with petitioners' understanding of the State Department's letter, the court would have granted mandamus relief. That contention lacks merit. The court of appeals did not indicate that it would have granted mandamus relief if it agreed that the Executive Branch had warned that the litigation itself would harm foreign relations. The court of appeals instead held that a necessary precondition for even considering a mandamus remedy was an *unambiguous* Executive Branch *request for dismissal*. Pet. App. 18a.

Moreover, under the court of appeals' approach, even an unequivocal request for dismissal by the Executive Branch would fail to trigger the grant of mandamus relief. Rather, the court emphasized that mandamus would be warranted only if a district court's error were "indisputable," and the court indicated that petitioners could not satisfy that standard because no case had ever held that a dismissal on political question grounds is required when a private party sues a private corporation. *Id.* at 18a-19a. That reason for denying mandamus relief would remain present even if the Executive Branch had unequivocally requested dismissal. Accordingly, far

from providing a basis for denying review, the court of appeals' approach to mandamus relief highlights the inadequacy of mandamus as a means of obtaining review in the context of this case—and correspondingly underscores why collateral order review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN J. WEINSTEIN
ROBERT J. MEYER
WILLKIE FARR & GALLAGHER LLP
1875 K St., N.W.
Washington, DC 20006
(202) 303-1000

THEODORE V. WELLS, JR.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Ave. of the Americas
New York, NY 10019

ALEX YOUNG K. OH
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1615 L St., N.W.
Suite 1300
Washington, DC 20036

WALTER E. DELLINGER
Counsel of Record
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

PAUL W. WRIGHT
PATRICK J. CONLON
EXXON MOBIL CORPORATION
800 Bell Street
Houston, TX 77002

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